

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Bhaskar S. Palekar, M.D., P.A., and)	CIVIL ACTION NUMBER
Bhaskar S. Palekar, M.D)	
)	08C-10-269-JOH
Plaintiff/Counterclaim Defendants)	
)	
v.)	
)	
Vikas Batra, M.D.)	
)	
Defendant/Counterclaim Plaintiff)	

Submitted: December 23, 2009

Decided: May 18, 2010

MEMORANDUM OPINION

*Upon Motion of the Plaintiff/Counterclaim Defendant for
Summary Judgment - **GRANTED in part, and DENIED in part***

*Upon Motion of the Defendant/Counterclaim Plaintiff for
Summary Judgment - **DENIED***

Appearances:

Adam Balick, Esquire, of the Law Offices of Balick & Balick, Wilmington, Delaware,
Attorney for the Plaintiff/Counterclaim Defendants

Laurence V. Cronin, Esquire, of Smith Katzenstein & Furlow, LLP, Wilmington,
Delaware, Attorney for the Defendant/Counterclaim Plaintiff

HERLIHY, Judge

Dr. Vikas Batra was once the most profitable physician in Dr. Bhaskar Palekar's Sussex County internist practice. However, after nearly five years with his former employer, Dr. Batra left it to open another practice nearby and took some of Dr. Palekar's patients with him. This caused Dr. Palekar to seek damages stated as liquidated damages in their employment agreement.

Dr. Batra, in turn, alleges that he was not paid all the bonuses that were rightfully due to him under the same employment agreement upon which Dr. Palekar relies. He has filed a counterclaim for unpaid wages, fees, and statutory liquidated damages under Delaware's Wage Payment and Collections Act.

Before the Court are cross motions for partial summary judgment. Dr. Palekar moves for summary judgment on his damage claim, namely that Dr. Batra breached the employment agreement and that he is due the liquidated damages specified in that agreement. He also seeks judgment in his favor that Dr. Batra is not entitled to damages under Wage Payment Act. In turn, Dr. Batra seeks judgment in his favor that the contractual liquidated damages provision is unenforceable and that the other kinds of damages Dr. Palekar seeks are unavailable. Swirling around both motions is the key issue of whether any party was in breach of such party's alleged breach upon the opposing party's claims.

The Court finds that Dr. Batra was in breach of the agreement. If Dr. Palekar did not materially breach it prior to Dr. Batra's breach, the liquidated damages provision is

valid and shall be enforced. However, the Court cannot determine at this time whether Dr. Palekar breached the contract or if his performance was excused.

Also, the Court holds that the counterclaim brought under the Wage Protection and Collection Act, as pled, does not allow for liquidated damages because it was reasonable for Dr. Palekar to withhold wages that came due after Dr. Batra's separation. Finally, the Court cannot determine if Dr. Palekar can be held personally liable under the same Act at this time.

Dr. Palekar's motion for partial summary judgment is **GRANTED in part and DENIED in part**. Dr. Batra's motion for partial summary judgment is **DENIED**.

Factual Background

Plaintiff, Dr. Bhaskar S. Palekar came to the United States from India in 1972 to complete his residency and training as a medical doctor in Philadelphia. He is an internist and the principal of Palekar & Associates, P.A. ("the Practice"), with offices in Lewes and Georgetown, where he has been for over 30 years. Defendant, Dr. Vikas Batra is also an native of India who received his medical degree there before coming to the United States to practice in 1996, where he, too, completed his residency and training in Philadelphia. He is an internist and has a fellowship in pulmonary critical care and deep sleep medicine.

In late 2002, Batra¹ wished to practice in Sussex County to be near his wife, also a medical doctor. Because Batra was not a American citizen he needed to obtain the proper visa to work in the United States. This allowed Batra to continue his education in the United States, but he would have to return to India and practice for two years following the completion of his residency. Instead of returning to India, Batra applied for a special visa that allowed him to remain in the country and work in underserved areas. That visa was contingent upon Batra's obtaining employment in such an area.

Batra met Palekar through a colleague of Batra's wife. Palekar was impressed with Batra and offered him a position at the Practice. On March 14, 2003, the Practice and Batra entered into an employment agreement ("the Agreement"). The Agreement was to last three years and contained the following restrictive covenant at ¶ 4(c):

In recognition of the expenses incurred by Employer [the Practice] in employing and introducing Employee [Batra] to the medical community (A) so long as Employee holds a United States H-1-B immigration visa, during the Term of this Agreement, and, if terminated before the end of the Initial Term, had the Agreement not been terminated, and (B) when Employee's H-1-B visa expires or is replaced by another statues from the United States Immigration authorities, for a period equal to two (2) years beyond the termination or expiration of this Agreement:

if Employee, within a twenty (20)-mile radius of any of Employer's office sites at which Employee practices, directly or indirectly, owns, manages, operates, controls, is employed by or is connected in any manner with the business engaging in the practice of medicine or rendering health care, including, without limitation, any free standing facility, any private practice,

¹ Because both of the parties and most other people involved in this controversy are medical doctors, the Court will deviate from its normal practice of referring to these people by their title.

any governmental agency, any hospital, nursing home, clinic, health or health-related unit; or, within the above geographical limit, solicits, treats, diagnosis or consults with any patients or former patients of Employer, or uses any efforts to persuade or induce any patients of Employer to leave Employer for treatment, diagnosis or consultation with, or by none not associated with Employer, then Employee shall immediately pay to Employer the sum of Two Hundred Thousand Dollars (\$200,000.00), as liquidated damages, and in addition, Employee shall not be entitled to any compensation based on collections for Employee's services which are received after the Termination Date, notwithstanding anything herein to the contrary. The parties agree that actual damages would be difficult to calculate, that the liquidated damages set forth herein represent a reasonable estimate of the monetary damage which will be suffered by Employer if Employee violates the terms of this paragraph and the parties agree that the liquidates damages provision herein are not a penalty. If the scope, period of time or area of restriction specified in this paragraph should be adjudged unreasonable in any court or dispute resolution proceeding, then the period of time, scope or area of restriction shall be reformed to the maximum time, geographic or occupational limitations permitted by the applicable laws. Employer may offset any amounts owed to it pursuant to this paragraph by any amounts owed by Employer to Employee pursuant to this Agreement or otherwise.²

Batra started working for the Practice on June 2, 2003. The Agreement provided for automatic one year renewals unless either side indicated a desire to terminate the Agreement, and also allowed either party to terminate the agreement after 120 days notice.

Initially, the Practice did not have the volume of work to keep Batra productive. However, about one year after he joined the Practice, it bought another pulmonologist's practice. Batra's productivity then increased. Soon after, Batra became the most profitable physician at the Practice.

² J.A. at 282.

A dispute over bonuses payments soon developed between the two doctors. Batra asserted that he was due bonuses under the Agreement for 2005 and 2006. However, Palekar was not able to pay these bonuses due to insufficient cash flow. Around January 2007, Palekar began to pay Batra an additional \$1,500 per biweekly pay period. The exact nature of these payments is in dispute. Batra argues that this payment was for unpaid bonuses he was due, and that this was contingent upon reaching an amendment to his employment agreement. Palekar represents that these payments were an accord and satisfaction for past due bonuses. That discrepancy is at issue in this motion.

On December 26, 2007, Batra submitted his resignation to Palekar. His final day at the Practice was April 30, 2008. Shortly after he left the Practice, Batra began to work with his wife. His new employment is located in Rehoboth Beach and is within 20 miles of the Practice. Additionally, it is undisputed that Batra took some of Palekar's patients with him when he left.

Palekar filed suit to enforce the \$200,000 liquidated damages provision, or in the alternative, recovery of actual damages and damages based on unjust enrichment. Batra has since filed a counterclaim under the Delaware Wage Payment and Collection Act ("the Act") for allegedly unpaid wages. He seeks the bonuses he claims were not paid, plus statutorily prescribed attorney's fees and liquidated damages. Both parties have filed motions for summary judgment. Part of the motions are cross motions relating to the validity of the contractual liquidated damages provision and the other parts concern

Palekar's alleged material breach of the Agreement while Batra was still working at the Practice and Batra's claim for statutorily authorized liquidated damages under the Act.

Parties' Contentions

Dr. Bhaskar Palekar's Motion for Partial Summary Judgment

Palekar argues that the liquidated damages provision in the Agreement is valid and enforceable. He asserts that there is no genuine issue of fact regarding whether Batra is in breach. He contends, with citations to the record, that it is undisputed that Batra left his position with the Practice to practice medicine with another affiliation that was within 20 miles of the Practice. Further he represents that Batra took some of Palekar's patients with him when he left.

Palekar states that the Court should give effect to the written language of the contract as it is the best indication of the parties' intent. He argues this is consistent with Delaware courts' desire to give effect to the intent of the parties. Specifically, he argues that the liquidated damages clause is enforceable because it meets the requirements that Delaware precedent and statutes have established regarding the applicability of these provisions. He states the Agreement meets the requirements generally given to all restrictive covenants, and that the amount of liquidated damages is a reasonable approximation of unascertainable damages that Palekar would suffer if Batra breached the Agreement. He claims that this allows the Court to grant summary judgment and determine that the liquidated damages amount is enforceable.

Palekar also addresses Batra's counterclaim for unpaid bonuses. He acknowledges that summary judgment is inappropriate for the underlying wage payment claim, but seeks judgment on the liquidated damages available under the Act and attorney's fees. He argues that the Act requires the employer's knowledge and that it is undisputed that the Practice was not aware of any bonus deficiencies. In the alternative, he argues that if he did have knowledge of unpaid bonuses, that it was reasonable for him to withhold them because Batra owed the Practice \$200,000.

Palekar argues that he cannot be held personally liable because there are not enough facts to support the knowledge requirement used when a plaintiff attempts to seek personal liability against a principal of his employer. He repeats his argument that he cannot have knowingly withheld wages, and that even if he did withhold wages, that it would be reasonable to do so. Finally, he argues that Batra waived his right to bring this counterclaim because he accepted an alternative consideration in lieu of contractual performance. In response, Batra argues that 6 *Del. C.* § 2707 does not allow any damages for any restrictive covenants that affect medical doctors. He then points to the fact that he was successful for the Practice and brought it a large amount of income. He highlights the fact that Palekar cannot accurately describe the expenses that he undertook when Batra joined the Practice, which allegedly form the basis of the \$200,000 figure. He states that the liquidated damages clause of the Agreement is not enforceable.

With respect to the Palekar's argument concerning the counterclaim, Batra states that wages were withheld long before Batra left the Practice, and that he is seeking damages based upon those failures to pay. He then argues that the record shows that Palekar was involved in the day-to-day operation of the Practice and he cannot dispute that he had knowledge of what was going on his company. Finally, he contends that there was no accord and satisfaction as Palekar described.

Dr. Batra's Motion for Partial Summary Judgment

Batra argues that the liquidated damages clause in the Agreement is not enforceable for multiple reasons. First, he claims that Palekar materially breached the Agreement by failing to timely pay the bonuses Batra was due. He claims that breach extinguished Batra's need to perform under the Agreement.

He next contends that the liquidated damages provision under the Agreement is unenforceable because when the contract was made, damages were easily ascertainable and therefore, cannot be represented by a pre-set amount. He asserts that the damages are not reasonable because they are only meant to be in consideration of the Practice hiring Batra and not as a modicum of damages based on his competition.

Batra also argues that 6 *Del. C.* § 2707 does not allow any damages to be awarded from a restrictive covenant that affects a medical doctor. Finally, he contends that Palekar cannot receive an award for unjust enrichment because the contract exclusively determines the rights of the parties and any damages (to which Batra claims there can be none) must

spring from the contract.

In response, Palekar argues that there are genuine issues of fact concerning whether the Agreement was breached because Batra agreed to accept an alternative amount of bonuses in 2007 when he brought up the issue with Palekar. Palekar claims that Batra's action represents either an accord and satisfaction, or a waiver, or both. He says that damages arising from an employee treating an employer's patients after he leaves his employ are not easily ascertainable and are a valid reason to utilize liquidated damages. He also states that the plain language of § 2707 allows for monetary damages springing from a restrictive covenant and only operates to bar injunctive relief that prevents a physician from actually practicing after he leaves his prior employment. Finally, Palekar represents that he is free to seek an unjust enrichment claim based upon an unenforceable contract. He argues that the cases cited in support of Batra's contention that the contract would have to control only dealt with enforceable contracts.

Standard of Review

Summary judgment may only be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.³ The party who seeks summary judgment bears the burden of showing a lack of genuine issue and

³ *Windom v. Ungerer*, 903 A.2d 276, 280 (Del. 2006).

entitlement to judgment as a matter of law,⁴ and the Court must view the record in the light most favorable to the non-moving party.⁵ Often where there are cross motions for summary judgment, the implication is that there is no factual conflict.⁶ However, such motions do not *per se* mean there is an absence of genuine issues of material fact.⁷

Discussion

Dr. Batra Breached the Agreement

There is no genuine issue of material fact regarding whether Batra breached ¶ 4(c) of the Agreement. After reviewing the record, the Court notes the following facts are not in dispute:

- The Agreement was in effect from June 2, 2003, until June 1, 2008, pursuant to an addendum to the Agreement that enlarged it from three until five years in duration.⁸
- On April 30, 2008, Batra left the Practice and shortly thereafter opened a new practice with his wife.⁹
- Batra's new practice was located within 20 miles of both of the Practice's offices from where Batra previously worked.¹⁰
- Batra treated some of the patients he previously treated at the Practice in his new

⁴ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

⁵ *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

⁶ *Browning-Ferris v. Rockford Enters.*, 642 A.2d 820, 823 (Del. 1993).

⁷ *Mason v. United Servs. Auto. Assoc.*, 697 A.2d 383, 392 (Del. 1997).

⁸ J.A. at 289.

⁹ *Id.* at 228-29, 314-15.

¹⁰ *Id.* at 314-15

practice.¹¹

The Court concludes that the clear terms of the Agreement, coupled with the undisputed facts listed above, mean that Batra was in violation of ¶ 4(c) of the Agreement.¹² Batra did in fact leave the practice early to enter another practice within 20 miles of a location he previously worked. Also, he treated some patients from Palekar's office. Paragraph 4(c) contains a restrictive covenant and \$200,000 in liquidated damages. In order to enforce them, the Court must determine that both are proper.

The Liquidated Damages Clause is Valid and Enforceable

It is a basic tenant of contract interpretation that the Court will give priority to the intention of the parties.¹³ "It is an elementary canon of construction that the intent of the parties must be ascertained from the language of the contract."¹⁴ Therefore, the Court notes that Batra intended to be bound by the terms of the contract that he now seeks to set aside when he signed the Agreement. It is also clear that the parties intended to stipulate that the damages resulting from Batra's competition with the Practice were difficult to ascertain, so a liquidated damages provision would be in effect in lieu of actual damages.

¹¹ *Id.* at 232, 315.

¹² This does not take into account Batra's argument that the Agreement was materially breached prior to his breach, thus discharging Batra's requirement to perform. That argument is addressed below.

¹³ *E.I. du Pont de Nemours and Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985).

¹⁴ *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 822 (Del. 1992).

However, the mere fact that the contract uses the word “liquidated damages” does not end the Court’s analysis.¹⁵

Delaware Code Title 6, § 2707 regulates how restrictive covenants can affect physicians:

Any covenant not to compete provision of an employment, partnership or corporate agreement between and/or among physicians which restricts the right of a physician to practice medicine in a particular locale and/or for a defined period of time, upon the termination of the principal agreement of which the said provision is a part, shall be void: except that all other provisions of such an agreement shall be enforceable at law, including provisions which require the payment of damages in an amount that is reasonably related to the injury suffered by a reason of termination of the principal agreement. Provisions which require the payment of damages upon termination of the principal agreement may include, but not be limited to, damages related to competition.¹⁶

A plain reading of § 2707 requires this Court to strike any provision of the Agreement which would restrict Batra’s ability to practice; however, provisions dictating damages are not void solely because of § 2707. There is no restriction in the Agreement that eliminates Batra’s ability to practice within 20 miles of the Practice. Palekar has not made any attempt, as far as the Court is aware, to prevent him from actually practicing after he left the Practice. To the extent that the Agreement calls for some degree of

¹⁵ *Olsen v. T.A. Tyre General Contractor, Inc.*, 907 A.2d 146, 2006 WL 2661140, at *2 (Del.)(TABLE).

¹⁶ 6 *Del. C.* § 2707.

damages based on Batra's breach, it is valid.¹⁷ The Court must now determine whether the liquidated damages provision is permissible.

Liquidated damages provisions are presumptively valid.¹⁸ The Court will uphold such a provision unless it is void as against public policy.¹⁹ Public policy requires the Court to determine whether the liquidated damages provision is the parties' best estimate of unascertainable damages or is a penalty designed to prevent a party from breaching the contract.²⁰ The validity of the provision also involves a review of the parties' intention to the contract.²¹ This Court has clearly explained the difference between a valid and invalid liquidated damages term in *S.H. Deliveries, Inc. v. Tristate Courier & Carriage, Inc.*:

Determining whether a stipulated sum is for a penalty or for liquidated damages is answered by application of a two-part test: a stipulated sum is for liquidated damages [and thus valid] when (1) the damages which the parties might reasonably anticipate are difficult to ascertain (at the time of contracting) because of their indefiniteness or uncertainty, and (2) the amount stipulated is either a reasonable estimate of the damages which would probably be caused by the breach or is reasonably proportionate to the

¹⁷ See *Christiana Med. Group P.A. v. Ford*, 2008 WL 162829 (Del. Super.)(holding that § 2707 does not prohibit the enforcement of a liquidated damages provision if the provision is otherwise valid).

¹⁸ *Piccotti's Rest. v. Gracie's, Inc.*, 1988 WL 15338 (Del. Super.).

¹⁹ *S.H. Deliveries, Inc. v. Tristate Courier & Carriage, Inc.*, 1997 WL 817883 (Del. Super.).

²⁰ *Id.*

²¹ *Del. Bay Surgical Servs., P.A. v. Swier*, 900 A.2d 646, 650 (Del. 2006).

damages which have actually been caused by the breach.²²

In short, the Court will uphold a liquidated damages clause if the damages stemming from the breach are difficult to ascertain and the fixed amount is reasonable.

The Court finds that the damages were difficult to ascertain. First it should be noted that the parties stipulated to that fact in the contract. Paragraph 4(c) states, “The parties agree that actual damages would be difficult to calculate[.]”²³ This Court has held, “[W]here the parties themselves have unambiguously concluded that such a value is difficult to ascertain should the agreement be breached, this Court will not construe that conclusion differently.”²⁴ The Court relies on that objective manifestation of the parties’ intent, as stated in the Agreement, to establish that damages were difficult to ascertain when the Agreement was executed. Put simply, it should come as no surprise that the Court will hold a party to the contract he signed.²⁵

Batra argues that this provision is not meant to estimate damages that were suffered when Batra treated Palekar’s patients, but instead was designed to represent the amount that Palekar had to spend in order to introduce him into the Sussex County medical

²² *S.H. Deliveries*, 1997 WL 817883, at *2.

²³ J.A. at 282.

²⁴ *Piccotti’s Rest.*, 1988 WL 15338, at *2.

²⁵ Batra has made no argument that the agreement was unconscionable or void. He does argue, however, that his obligation to perform has already been excused by virtue of Palekar’s breach. That argument is analyzed below.

community. However, a close inspection of the Agreement leads to the conclusion that the \$200,000 is meant to compensate for the profits lost as a result of this competition. “[T]he liquidated damages set forth herein represent a reasonable estimate of the monetary damage which will be suffered by Employer if Employee violates the terms of this paragraph.”²⁶ The paragraph referred to explicitly states that Batra is in breach if he treats one of Palekar’s patients in a specified geographic area during a specified time. As stated above, that breach occurred.

This Court has held that, “The harm resulting from lost clients is not capable of accurate estimation and the damages are uncertain.”²⁷ Batra alleges that the Court could look backward at the amount of profits he allegedly diverted from the Practice and fix a percentage as damages, thus creating a certain and concrete amount of damages. While this approach seems tempting, it is not proper. The Court will not look backward and state whether damages are ascertainable after the breach. The Court must look toward the parties’ ability to properly assess the damages *at the time the contract was executed*.²⁸ This is the precise scenario at hand. The Agreement satisfies the first prong of the *S.H. Deliveries* test.

The second prong requires the Court to determine whether the sum affixed is a

²⁶ J.A. at 282.

²⁷ *Faw Casson & Co., L.L.P. v. Halpen*, 2001 WL 985104, at *2 (Del. Super.).

²⁸ *S.H. Deliveries*, 1997 WL 817883 at *2

reasonable estimate of the damages, or is reasonably proportional to the actual harm.²⁹ The Court in *S.H. Deliveries* concluded that the affixed sum was reasonable as a matter of law.³⁰ This Court reaches the same conclusion. Batra highlights the fact that he was very profitable when working at Palekar's practice and points to that as a method to establish the liquidated damages provision's unenforceability.³¹ Arguing that he was profitable misses the mark. The liquidated damages provision is part of the Agreement, and performing as required by it (or even exceeding it) does not excuse its performance, nor mitigate its breach.³² Further, Batra argues that Palekar never attempted to justify his damages or explain how there are \$200,000 worth of injury to his Practice.³³ That argument is also without merit. The plaintiff does not have to show a corresponding amount of damages *actually* occurred.³⁴ The liquidated damages can serve as a substitute for going through the effort of attempting to quantify actual damages.³⁵

²⁹ *Id.*

³⁰ *Id.* at *4-5.

³¹ Def.'s Resp. to Pls.' Mot. Summ. J. at 8 (highlighting that while he was at the Practice, he brought in over \$1.8 million to it).

³² Although Batra continually states that the he remained at the Practice more than 23 months following the initial term, he was still bound by the Agreement because both parties signed a two year extension.

³³ *Id.* at 7.

³⁴ *Piccotti's Rest.*, 1998 WL 15338, at *2-3.

³⁵ *Id.* at *3.

As with other challenges to a liquidated damages provision, the party moving to strike it bears the burden of proof.³⁶ “It is clear that in order for defendant to succeed on his claim of unreasonableness, he must show not only that the amount fixed bears no relation to the harm arising from a breach, but also that the agreed upon sum was unreasonable in light of the anticipated loss.”³⁷ Here, Batra’s argument and observations about his productivity actually militate toward the fixed amount’s reasonableness. In the last four full years he worked at the Practice, his least profitable year earned \$311,511 and in his most profitable year brought in \$507,782.³⁸ Given the amount he brought in to the Practice, \$200,000 is a reasonable estimate of damages if Batra took any patients with him when he left the practice. Even if the damages proven were actually less than \$200,000, the liquidated damages provision would still be valid because it is a reasonable estimate. “It matters not whether actual damages are proven, or that the liquidated damages are substantially larger than the actual damages, so long as the liquidated damages were a reasonable estimate of the damages which would be caused.”³⁹

The Court is satisfied that the \$200,000 liquidated damages provision is a

³⁶ *Christiana Med. Group*, 2008 WL 162829, at *4; *S.H. Deliveries*, 1997 WL 817883, at *3.

³⁷ *Piccotti’s Rest.*, 1988 WL 15338, at *2.

³⁸ Batra’s Mot. for Summ. J. at 4-5.

³⁹ *S.H. Deliveries*, 1997 WL 817883, at *2 (holding that the liquidated damages provision was a valid estimate of actual damages as a matter of law).

reasonable estimate when compared to Batra's income and the possibility of harm that may result from Batra treating the Practice's patients in violation of the Agreement. Because the contract was breached and both prongs of the *S.H. Deliveries* test are met, the liquidated damages provision is effective unless Batra can prove that Palekar materially breached the Agreement prior to Batra's breach, thus excusing Batra's performance.

To the extent that Palekar alleges actual damages based on Batra's breach or a claim for unjust enrichment, he is not permitted to recover. The liquidated damages provision is the sole provision that Palekar can recover under as it is intended to stand in place of actual damages.⁴⁰

Dr. Batra's Claim that Dr. Palekar Materially Breached the Agreement Presents Genuine Issues of Material Fact and is not Proper for Summary Judgment

Batra argues that Palekar was in material breach of the Agreement in 2005 or 2006 when he failed to pay Batra the bonuses that were allegedly due under the it. He claims this discharged his duty to perform. Palekar responds by presenting three separate, yet related, arguments. First, he asserts that he did not materially breach the contract because of somewhat conflicting bonus payment schedules contained in the Agreement; second, that Batra waived his right to timely collection of bonuses when he addressed the need with Palekar; and third, that they worked out an accord and satisfaction when the bonus arrears

⁴⁰ See *Am. Energy Sys. v. Ingleside Homes, Inc.*, 1991 WL 166117, at *3 (Del. Super.)(holding that a plaintiff cannot recover for both liquidated and actual damages concurrently).

were discussed.⁴¹

Batra is correct that generally a party cannot be heard to complain about a breach of a contract when he first has committed a material breach.⁴² However, under Delaware law, parties may agree to a subsequent contract, and performance under that subsequent contract will constitute full performance and satisfaction of the original agreement.⁴³ “If the parties intend for the new agreement to abrogate the former contract, the parties may seek remedies only under the latter agreement.”⁴⁴ If an accord and satisfaction existed, then Palekar was not in breach and Batra still was obligated to perform under the Agreement.

An accord and satisfaction contains three elements:

(1) that a bona fide dispute existed as to the amount owed that was based on mutual good faith; (2) that the debtor tendered an amount to the creditor with the intent that payment would be in total satisfaction of the debt; and (3) that the creditor agreed to accept the payment in full satisfaction of the debt.⁴⁵

⁴¹ Palekar also notes that Batra “should not be heard to complain” about his lack of bonuses because he was paid more than was provided for in the contract in years subsequent to the first. This argument presents no basis upon which a material breach is either not a breach in the first place or is excused and is without merit.

⁴² *Hudson v. D. & V. Mason Contractors, Inc.*, 252 A.2d 166, 169 (Del. Super. 1969).

⁴³ *CitiSteel USA, Inc. v. Connell Ltd. P’Ship.*, 758 A.2d 928, 931 (Del. 2000).

⁴⁴ *Id.*

⁴⁵ *Id.* (citing *Acierno v. Worthy Bros. Pipeline Corp.*, 693 A.2d 1066, 1068 (Del. 1997)).

Batra concedes that the first and second elements listed above are met.⁴⁶ However, he argues that “there is simply no credible evidence to support his assertion [that] Dr. Batra’s agreement to accept to [sic] \$30,000 as a compromise of plaintiff obligation was anything more than part of a comprehensive negotiation with respect to an extension of Dr. Batra’s employment agreement.”⁴⁷ Palekar testified in his deposition that the issue of unpaid bonuses arose between him and Batra and the two worked out an agreement that Paleker would pay Batra \$30,000 over 20 biweekly installments in order to satisfy the underlying arrears.⁴⁸ Batra’s deposition testimony indicates that he was willing to accept a \$30,000 dollar bonus in lieu of what was actually owed to him as part of the negotiations between them, but that acceptance was conditioned upon reaching a new agreement going forward.⁴⁹

The disagreement between parties about Batra’s intent when he accepted the \$30,000 shows that genuine issues of fact remain concerning accord and satisfaction. Usually determining intent is a factual undertaking, and this case is no different.⁵⁰ Due to the fact that genuine issues of material fact exist concerning whether a breach occurred,

⁴⁶ Batra’s Reply Br. at 2.

⁴⁷ *Id.* at 3.

⁴⁸ J.A. 050-052

⁴⁹ *Id.* at 209-11.

⁵⁰ *CitiSteel USA*, 758 A.2d at 931.

summary judgment is inappropriate at this time.⁵¹

Palekar also contends that Batra waived his right to enforce Palekar's alleged breach. Batra argues that there is no evidence that he knew about his right to collect bonuses that were in arrears until after he left Palekar's practice; therefore, he could not have waived any payments that were due to him. The Supreme Court has defined the three elements required to find a waiver: "(1) there is a requirement or condition to be waived, (2) the waiving party must know of the requirement or condition, and (3) the waiving party must intend to waive the requirement or condition."⁵²

Batra's argument that he was not aware of the shortage in his bonus payments until discovery in this litigation is contradicted by his deposition testimony:

Q. So is it your testimony that at the end of 2004 you had determined that your productivity bonus entitlement was in range of \$10,000?

A. That's correct

Q. You communicated that to Dr. Palekar?

A. That's correct.

Q. When did you do that?

A. I don't know the exact date when I met with him or exact time that I met with him. But it was, you know, each year, on multiple times each year we will have office meetings dealing with all these issues, compensation and things like that, it was brought up every time, that this much is the bonus due, and, like I said, he never objected to those at any time.⁵³

⁵¹ Super Ct. Civ. 56; *Dale v. Town of Elsmere*, 702 A.2d 1219, 1221 (Del. 2007).

⁵² *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005).

⁵³ J.A. at 199.

Q. When you told Dr. Palekar how much you were owed, I think it is your testimony that he more than one said: We don't have the money to pay you; is that correct?

A. That is correct.

Q. How did you respond to that?

A. I thought I made it very clear to him that I do want to collect that bonus that is owed. And, you know, at those times we did not have any, anything - - there was no fight going on, there is no other issues, and you know, he - - I figured that he is going to pay me as soon as possible. But years after years went by without bonus payment.

I did not send him any letter saying that I will terminate the agreement if you don't pay me or anything like that. It was, you know, like I said, I never knew there was any contention with the bonus until all the things started. We were all agreeable that this is when the bonus is due, he said that he is going to pay it, and he knew that I intend to collect it.

Q. When he said he was going to pay it, did he tell you when he was going to pay it?

A. He kept saying that he does not have the money, practice has a lot of loans, he is not even taking a salary home, and as soon as the money starts flowing in he is going to start paying me the bonus. He did not put any month or year to when he is going to start paying it.

Q. How did you respond when he told you that he couldn't pay you now but that he would pay you later?

A. I've always known Dr. Palekar to be a reasonable person, so I had no reason to doubt his intentions at that time. But I - - you know, we elected to see how things are in the next few months and he is going to start paying me, and maybe we will meet again, and he said: I don't have it, I'm going to start paying from this much time, and it never got paid.

So I'm not sure how to respond to your questions. I did not fight with him or I did not - - but I did tell him that I intend to collect the bonus and this much is the bonus due each year.⁵⁴

This deposition testimony clearly shows that Batra knew his right to collect the bonuses

⁵⁴ *Id.* at 201-03.

existed while he was still working with Palekar. Also, it is clear that sat on his rights to hold Paleker in breach and terminate the Agreement. However, it cannot be determined on a motion for summary judgement whether this inaction constituted an intent to waive his rights to terminate the contract. Therefore, much like the accord and satisfaction issue, summary judgment is not appropriate with respect to waiver because a genuine issue of material fact still exists concerning Batra's intent behind his actions.

Because there may be a valid accord and satisfaction, or a waiver, the Court cannot determine whether there was a material breach of the Agreement. That decision must be determined at trial.

The Counterclaim for Statutory Damages and Fees under the Wage Protection and Collection Act Cannot be Properly Decided at this Time

On November 9, 2008, Batra filed a counterclaim alleging that Palekar had not paid him bonuses that were due between March 2003 until the end of April 2008. He claims that pursuant to ¶ 3 of the Agreement, any unpaid bonuses were to be paid no later than 60 days after his separation from Palekar's practice; thus, requiring any unpaid bonuses to be paid no later than June 30, 2008.⁵⁵ In addition to unpaid wages, Batra demands statutory liquidated damages and fees.⁵⁶

⁵⁵ Countercl. at ¶¶ 20-21.

⁵⁶ *Id.* at ¶ 23.

The counterclaim is brought under Delaware’s Wage Protection and Collection Act.⁵⁷ The Act provides that all employers shall pay their employees on the regularly scheduled payment dates.⁵⁸ It creates a private cause of action by the employee against the employer for employer’s failure to timely pay.⁵⁹ An employee is entitled to actual damages,⁶⁰ attorney’s fees and reasonable costs assessed against the employer,⁶¹ and liquidated damages equal to 10% per diem of the deficiency or the full amount of the unpaid wages.⁶² Statutory liquidated damages are only available under 19 *Del. C.* § 1103(b) if the employer fails to pay an employee wages and does not have reasonable grounds for disputing the obligation to pay such wages.⁶³ The action is subject to a one-year statute of limitations from the date of the employer’s failure to make a payment,⁶⁴ provided the employee has knowledge of the deficiency.⁶⁵

⁵⁷ 19 *Del. C.* §§ 1101-1105.

⁵⁸ 19 *Del. C.* § 1102.

⁵⁹ 19 *Del. C.* § 1113(a).

⁶⁰ *Id.*

⁶¹ 19 *Del. C.* § 1113(c).

⁶² 19 *Del. C.* § 1103(b). “If an employer, without reasonable grounds for dispute fails to pay an employee wages, as required under this chapter . . .” *Id.*

⁶³ *Id.*

⁶⁴ 10 *Del. C.* § 8111; *Martinez v. Gastroenterology Assocs., P.A.*, 2005 WL 1953091, at *2 (Del. Super.).

⁶⁵ *Seitz v. Siegfried Group, LLP*, 2001 WL 1198941 (Del. Super.)(holding the statute of
(continued...)

Palekar seeks summary judgment with respect to the statutory liquidated damages demand. He argues that it is undisputed that he thought he had paid Batra's bonuses in full when Batra left the Practice in 2008. He claims that Batra never did anything to disabuse his belief that he had completely paid Batra's bonuses. Further, Palekar asserts that if he were aware of any bonuses due when Batra left his practice, his retention of those bonuses would be reasonable. This is because Batra had already started at his new employer, which was in violation of the Agreement, and \$200,000 in contractual liquidated damages immediately became due. He claims that these are reasonable grounds to withhold the wages and this does not give rise to any liability under § 1103(b).

In response, Batra argues that Palekar ignores the timing of his counterclaim. He states, "[T]he plaintiff here violated the statute more than 2 years before Dr. Batra left his employment."⁶⁶ Further, "Both plaintiff and Dr. Batra have repeatedly acknowledged that defendant was owed a bonus as early as 2005, and that no payments were made toward that bonus until 2007."⁶⁷

The counter-complaint alleges, however, that Palekar's failure to pay all took place on June 30, 2008. On June 30, 2008, Batra was already employed at his new practice by

⁶⁵(...continued)
limitations applicable to the Wage Payment and Collections Act does not begin to run until the employee is aware that he had not received full wages due to him).

⁶⁶ Batra's Answer to Palekar's Mot. for Summ. J. at 11.

⁶⁷ *Id.*

then, and doing so he was in breach of the Agreement and the valid contractual liquidated damages had already come due. Because he owed Palekar \$200,000, it was reasonable for the Practice to withhold any bonuses that it still may have owed him. This Court stated, “The employer may avoid the penalty imposed by the statute if he has any reasonable grounds for dispute of the unpaid wages.”⁶⁸ It further held in *Delaware Bay Surgical Services, P.A. v. Swier*, that it is reasonable for an employer to withhold wages when an employee leaves his employer and owes employment-related debt.⁶⁹ *Swier* considered a similar defense by an employer accused of withholding wages under the Act. The employer claimed his reliance on a contractual liquidated damages provision that made the employee liable to it upon his breach provided a reasonable basis for the employer to withhold wages.⁷⁰ The Court held, “[W]hen an employee leaves owing an employment-related debt to his employer, the employer may deduct the employee’s debt from final wages.”⁷¹ Consistent with that holding, the Court found that the contractual liquidated owed to the employer precluded the employee from claiming statutory liquidated damages under § 1103(b).

⁶⁸ *Peirson v. Hollingsworth*, 251 A.2d 350, 352 (Del. Super. 1969).

⁶⁹ 900 A.2d 646, 653 (Del. 2006).

⁷⁰ *Id.* at 653-54.

⁷¹ *Id.* at 653.

Batra argues that Palekar neglects to include his prior alleged failures to pay Batra his bonuses and claims that there is was no reasonable grounds to withhold the wages at that time. However, that allegation was not pled in Batra's counterclaim and Palekar was never put on notice in the pleadings that he would have to defend an allegation that he did not pay the bonuses in 2005 and 2006. Batra would need to amend his counter-complaint, with leave of the Court, to include allegations of earlier withheld payments.⁷²

The counter-complaint, as stated and unamended, alleges that Palekar withheld any bonuses due to Batra on June 30, 2008. At that time, Batra had already moved on to his new practice and was in violation of the Agreement, thus triggering the contractual liquidated damages and making Batra liable to the Practice for \$200,000.⁷³ It was reasonable for Palekar to withhold any bonuses that he may have owed Batra at that time. Therefore, the Court grants summary judgment in favor of Palekar on the liquidated damages demanded under § 1103(b).

Palekar also alleges that he cannot be personally liable for a violation of the Act for the same reasons he advanced concerning the statutory liquidated damages claim. Namely

⁷² Of course, Batra would have to be mindful of the applicable one year statute of limitations described in this opinion. 10 *Del. C.* § 8111.

⁷³ Batra disputes the enforceability of the Agreement because of Palekar's alleged prior material breach. However, no determination had ever been made regarding that breach and the record does not indicate that Batra ever attempted to inform Palekar that the Agreement was no longer in effect. Therefore, whether the Agreement was still legally binding or not has no bearing on Palekar's reliance on the contractual liquidated damages as far as it concerns his reasonable grounds to dispute the bonuses that were due.

that he did not know he owed Batra anything; or, in the alternative, that withholding the bonuses was reasonable.

Reasonableness is not the measuring stick for withholding wages under the Act. While the lack of reasonableness is necessary to award statutory liquidated damages under § 1103(b), it is not required to impose liability upon the employer. An employer, even though it reasonably withheld wages, can still be liable under the Act, it simply cannot be liable for statutory liquidated damages. Therefore, Palekar's reasonable reliance on the Agreement and his reliance on Batra owing him \$200,000 is not a defense.

This Court, in *McMartin v. Quinn* held that when an individual is named as a defendant under the Act, there is a scienter requirement in order to impose liability.⁷⁴ The Court observed, "For purposes of this chapter the officers of a corporation and any agents having the management thereof who *knowingly* permit the corporation to violate this chapter shall be deemed to be the employers of the employees of the corporation."⁷⁵ While Palekar alleges that he did not have knowledge of the wages he allegedly owed Batra, such a determination cannot be made at this time. There is a genuine issue of material fact regarding Palekar's knowledge and summary judgment is denied.

Batra is found to be in breach of the Agreement and its liquidated damages provision is triggered against him unless he can establish that Palekar materially earlier

⁷⁴ 2004 WL 249576, at *4 (Del. Super).

⁷⁵ *Id.* (citing 19 *Del. C.* § 1101(b)).

breached the contract and his performance was excused. Summary judgment is granted in favor of Palekar and against Batra with respect counterclaim for liquidated damages under § 1103(b) of the Wage Payment and Collection Act, but Batra may still pursue other remedies, including fees and actual damages.

Conclusion

For the foregoing reasons, plaintiff, Dr. Bashra Palekar's motion for summary judgment is **GRANTED in part and DENIED in part**. Defendant, Dr. Vikas Batra's motion for summary judgment is **DENIED**.

IT IS SO ORDERED.

J.